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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1153

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON, and COLUMBUS P. BRITTAIN,

Petitioners,

vs.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, etc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON, and COLUMBUS P. BRITTAIN,

Petitioners,

vs.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, etc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled cause on January 21, 1966.

Citations to Opinions Below

The first opinion of the District Court in this litigation is reported in 238 F. Supp. 1016 (D. C. N. J. 1964). The

first opinion of the Court of Appeals is reported in 342 F. 2d 430 (3 Cir. 1965). The second opinion of the Court of Appeals is not yet reported (3 Cir. 1966), and is printed in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on January 21, 1966 (Appendix B, p. 6a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Should not *certiorari* be granted in this case, which has been decided by the Third Circuit contrary to similar cases in the Second, Fourth and Ninth Circuits?

2. Should not *certiorari* be granted to review a judgment granting plaintiff only partial union membership, following a jurisdictional holding under the Landrum-Griffin Act that plaintiff was already a full member?

3. Should not *certiorari* be granted to correct error which a court of appeals acknowledges but which it believes itself helpless to correct through an incorrect view of "law of the case"?

4. Should not *certiorari* be granted to remedy a dangerously narrow view of the Third Circuit's role in labor cases?

Statutes Involved

The statutory provisions involved are:

29 U. S. C. A. §402 (o), as follows (Section 3(o) of Labor Management Reporting and Disclosure Act):

> " 'Member' or 'member in good standing', when used in reference to a labor organization, includes

any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and by-laws of such organization."

29 U. S. C. A. §411 (a)(1), as follows (Section 101(a)(1) Labor Management Reporting and Disclosure Act):

"Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

29 U. S. C. A. §412, as follows (Section 102, Labor Management Reporting and Disclosure Act):

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

Statement of the Case

Petitioners are four members of the international union of which respondent is a local. When they sought to transfer their membership from their original locals to respondent in accordance with the requirements of the international constitution, respondent refused to accept them. Thus deprived of their membership rights, petitioners brought suit under Section 102 of the Labor-Management Reporting and Disclosure Act (hereinafter the "Act"), 29 U. S. C. A. §412, specifically alleging violation of Section 101 (a) (1) of the Act, 29 U. S. C. A. §411 (a) (1), and asking for relief under the Act and under the international constitution (hereinafter the "constitution").

The district court held it had jurisdiction under the Act as construed in *Hughes* v. *Local 11 of International Bridge, etc.*, 287 F. 2d 810 (3 Cir. 1961), *cert. den.* 368 U. S. 829 (1961). In *Hughes* the same international constitution had been construed favorably to a plaintiff situated as are petitioners. As the district court construed the Act under that case, an action does lie "against a union for its refusal to accept a transfer of membership from another local of the same international." The trial court fully adjudicated favorably to petitioners their right under the international constitution to transfer their existing membership to respondent by a tender of their membership books. The constitution gave respondent no discretion but to accept such tender under the circumstances of this case.

However, the district court insisted that, under *Hughes*, it could only order relief in terms of the substantive portion of the statutory provisions involved. It issued a judgment granting petitioners "the rights guaranteed to them by Section 101(a)(1)" of the Act.

Petitioners preferred an order in broader terms, but they accepted the one prescribed by the district court since they believed that, to secure the rights guaranteed by the Act, they would have to tender their membership books and have them accepted by respondent, all as required by the union constitution. Phrased differently, petitioners believed (and believe) that the enforcement of the order requires compliance with the union constitution. Such compliance would automatically give petitioners full membership, since fractional membership is not possible under that constitution. Petitioners saw (and see) no defect in an order in equity which, by forcing a compliance within the court's jurisdiction, incidentally gives them an additional benefit.

Respondent, however, was unhappy with the judgment, and it appealed. With the appeal it sought by motion in the District Court a stay of the entry of the judgment because, it said, *inter alia*, "If the judgment is enforced giving plaintiffs membership in defendant union the basis for the appeal would be moot since this is the question to be decided on appeal." The stay was granted pending the outcome of the appeal, on condition petitioners continued to be assigned to work by respondent and upon the filing by respondent of a *supersedeas* bond. In the words of respondent's brief, its appeal sought "a reconsideration of the finding that a member of one local of an International Union who has fulfilled the constitutional requirements for transfer to another Local is already a 'member' of that second local." Petitioners defended that finding and secured a *per curiam* affirmance. 342 F. 2d 430. Pending the appeal, the International had amended its constitution to permit transfer between locals only if the local to which transfer was sought approved the transfer. Respondent had then by motion vainly sought to gain the appellate

court's approval to argue its appeal as if that amendment were applicable to this case. At the argument, both court and counsel conceded the *Hughes dicta* was no bar to relief.

Upon the affirmance and the expiration of the stay, petitioners sought the return of their membership books, still in evidence, from the court. Securing them after a delay, they presented them to the local in accordance with the requirements of the international constitution. There is no other method by which they could be transferred so as to enjoy either all the rights of membership or those expressly guaranteed by the Act. Nonetheless, respondent refused the tender.

Petitioners promptly moved before the district court to hold respondent in contempt. To petitioners' astonishment, the court, having held that "an action" will lie "under the Labor-Management Reporting and Disclosure Act against a union for its refusal to accept a transfer of membership" (238 F. Supp. 1018), now stated, "Well, it seems to me that the *Hughes* case suggests that this Court has no right to order membership" (page 5a of petitioners' brief below). In keeping with its new view, the district court refused a contempt holding. Thereupon the petitioners sought to bring this new complexity before the Court of Appeals by a petition for rehearing, but the delay in securing the books for tender having caused the time for this hearing to elapse, the Court refused to extend it. An appeal followed, with a defeat for petitioners which is the subject of this petition.

Meanwhile, while still refusing to honor in any way the requirements of the international constitution, respondent has condescended to permit petitioners the right to attend meetings and vote, but not the right to run for office. Petitioners must still pay dues to their old locals (for they are still carried as members there) and work fees to respond-

ent. Petitioners occupy a status for which there is no warrant in the union constitution.

On the appeal at bar from the district court's refusal to hold respondent in contempt, the Court of Appeals reviewed the litigation in some detail and with a great deal of sympathy, but it alleged it was unable to grant relief. Inferentially (for it is nowhere stated) the higher court concluded it was bound by the doctrine of the law of the case and could not disturb the *Hughes dicta,* "suggested" as binding by the district court and now inferred as being cemented in place by the first affirmance. It also vaguely implied that petitioners had no right to appeal from a refusal to hold respondent in contempt of a final judgment. While the reasoning of the Court of Appeals in its refusal to extricate plaintiffs from their morass is nowhere clearly stated, its outline of the facts is clear—so clear that petitioners cannot understand how the Court can also say the record is "confused, uncertain."

Reasons for Granting the Writ

1. The opinion of the Court of Appeals for the Third Circuit is in conflict with the opinions of the Second, Fourth, and Ninth Circuits on the same matter.

In this case the Court of Appeals for the Third Circuit has determined that it is powerless under 29 U. S. C. A. §112 to enforce the union constitution's transfer provisions in favor of petitioners. This extraordinary ruling became the law of the Third Circuit when, in its latest opinion, it for the first time faced the issue created by petitioners' tender of membership books.

The Second, Fourth and Ninth Circuits are in direct disagreement.

The Second Circuit case is *Vars* v. *International Brotherhood of Boilermakers,* 320 F. 2d 576 (1963). There a wrongfully expelled union member was granted an injunction restoring him to membership.

The Fourth Circuit case is *Simmons* v. *Avisco Local 713, etc.,* 350 F. 2d 1012 (1965). In that case a union member brought suit alleging that his suspension from membership in the local was in violation of section 101(a)(5) of the Act, 29 U. S. C. A. §411(a)(5). He sought (1) an injunction to effect his restoration to membership and (2) money damages for injury to his reputation and resulting mental anguish. The Federal District Court granted a permanent injunction and entered judgment for plaintiff on a jury verdict of $15,000.00. The Court of Appeals affirmed. *Cf.* 350 F. 2d at p. 1018, where the injunction to effect his restoration to membership was held good.

The Ninth Circuit case is *International Brotherhood of Boilermakers* v. *Rafferty,* 348 F. 2d 307 (1965). In that case union members were expelled after trial on a charge of libel and other conduct alleged to be prohibited to members. They brought suit, claiming violation by the Union of the Act, specifically, of the Bill of Rights provisions. Judgment was granted in their favor, *inter alia,* to "restore to them all of their rights, privileges and benefits in the Union and Local, and to reinstate appellees as members in good standing thereof, the same as if they had never been penalized and expelled." (p. 309 of 348 F. 2d). This portion of the judgment (the only portion relevant to the case at bar) was affirmed on appeal.

On pages 314 and 315 of 348 F. 2d, the court discusses the extent to which Section 412 of the Act permits, in cases like *Ferger* and *Rafferty,* the granting of "such relief (including injunctions) as may be appropriate." It implies

that "relief" should be broadly construed, citing a definition thereof as including "deliverance from oppression, wrong or injustice." It concludes that, while in the case before it money damages were improper, "relief" in some cases could include them. The court never even questions the full return to membership ("the same as if they have never been . . . expelled") which the trial court granted.

2. The rule of this case, requiring union membership as a jurisdictional prerequisite but granting less than membership as the maximum of statutory relief, cannot have been the legislative intent and should be corrected.

The unfortunate state of the law in the Third Circuit, produced by the *Hughes dicta* and the two opinions in this case, requires little comment. This is so because of the frank acknowledgment of petitioners' plight, contained in the second opinion of the Court of Appeals. The absurdity of a rule which requires proof of membership as a jurisdictional requirement to get into court but sends the "successful" litigant out of court with only some of his membership rights is obvious.

However, the basis of the errors of the courts below requires a deeper analysis.

This case alleges a deprivation of rights granted by 29 U. S. C. A. §411 and asks for the relief provided by the Act and by the constitution of the International. Our theory was an action in equity seeking a mandatory injunction as provided by the Act and specific performance of the right to transfer under the union constitution. The courts below held those rights to be only those named in the Act and not all the rights granted by the union constitution. While petitioners (and three other Federal circuits) disagree with that holding, that is not the only reason we are here.

We are here because the courts below construed alleged limitations in Section 411 (the substantive statement) as a deprivation of power under Section 412 (the relief provisions). Because it could not (it thought) give petitioners all the rights of membership under Section 411, the district court decided it could give them no injunctive relief at all under Section 412.

Obviously, however, the court's adjective right to order transfer is complete and is unrelated to any limitation on the substantive rights to be enjoyed after transfer.

The courts below have failed to draw this distinction. They believe a mere statement in the judgment of the substantive rights to be enjoyed is somehow self-executing. It is almost as if the trial judge was striving manfully to help petitioners, unaware that Section 412 was in the law at all. If the judgment be regarded as self-executing, however, it creates a new class of *quasi* membership by judicial fiat as a kind of forced amendment to the union constitution. In the absence of fraud, the courts have no power to alter such a constitution. *United States* v. *Ames*, 99 U. S. 35 (1875).

In short, any limitation in Section 411 is unrelated to the broad equitable relief powers of Section 412. If, after such equitable relief, respondents believe petitioners have more substantive rights than they deserve, that may give respondent a right of action; but it does not have it now.

Moreover, it is to be noted that the confusion of the courts below as to the limits of substantive and adjective powers under the Act was never revealed until the contempt motion which began this proceeding. Only then could petitioners know of the courts' alleged helplessness under Section 412.

3. The theory of "law of the case" should not bar relief in the Court of Appeals, but if it does, this Court should grant relief.

While the Court of Appeals in its second opinion is sympathetic to petitioners' plight, it felt constrained for unexplained reasons to deny their plea. Presumably the Court of Appeals believed the theory of law of the case barred relief. In reaching this inferred conclusion, the higher court appeared not to realize the change in the district court's view following the first affirmance which we detailed above.

Thus the status of the case is similar to that in *Messinger* v. *Anderson,* 225 U. S. 436 (1912). There a Circuit Court of Appeals rendered a decison. Later the same point was otherwise decided by a state court. Then the Circuit was asked to agree with the state court decision, but it refused, citing law of the case as bar. Justice Holmes for this court said:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not to limit to their power. [Citing cases] Of course this Court, at least, is free when the case comes here. [Citing cases] In our opinion even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least, as against the decision of the circuit court of appeals, it was right."

As stated by this Court in *Southern Ry. Co.* v. *Clift,* 260 U. S. 316, 319 (1922), the law of the case does not supercede discretion; it merely directs it. And, in cases where

there is doubt whether the very decision held to be fixed in place by the doctrine was fully before the court on the prior hearing, law of the case even as a guide to discretion should not be applied. *Hartford Life Ins. Co.* v. *Blincoe,* 255 U. S. 129 (1921). *Cf. Connett* v. *Jerseyville,* 110 F. 2d 1015, 1018 (7 Cir. 1940); *Salvone* v. *Pilson,* 181 F. 2d 615 (C. A. D. C. 1950), *cert. den.* 339 U. S. 981 (1950).

In this case, it appears obvious that the Court of Appeals wanted to help petitioners but refused to do so only because of its own erroneous belief that it lacked the necessary power. As Justice Holmes held in *Messinger, supra,* even if the Court of Appeals does lack such power (which we do not admit), this Court is fully authorized to act. It is respectfully urged that this Court act, for otherwise the intent of Congress to protect the workingman from the union racketeeer will have been effectively thwarted.

4. This Court should correct the dangerous and narrow doctrine of federal court jurisdiction now established by the Court of Appeals.

The Court of Appeals by the *Hughes dicta* and the two opinions in this case has necessarily (even if unintentionally) concluded that it is limited under the Act to granting only those rights of membership stated in so many words in Section 101 (a) (1) of the Act. Such doctrine is of importance to millions of labor union members, and, if left on the books, could cause great confusion. We will mention in order some of the problems created:

(1) The limitation on federal action with the inferred suggestion that the petitioners must now go to state courts for relief contradicts the rule as to federal control of labor law laid down by Congress and this Court. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 244 (1959).

(2) The limitation on federal action violates the settled rule that, once a case is properly before a federal court, there is full jurisdiction in such court to dispose of all of it. *Hurn* v. *Oursler*, 289 U. S. 238 (1933); *Copra* v. *Suro*, 236 F. 2d 107, 116 (1 Cir. 1956). In the light of the broad grant of powers in Section 102 of the Act, there appears no ground for the narrow holding of the courts below.

(3) The judgment of the district court is broad enough in its terms to require the respondent to accept petitioners' request for transfer. This has been petitioners' view throughout this case. It was also respondent's view until the motion for contempt following the first appeal. Prior to that, the district court's self-imposed limitations applied in terms only to the provisions of Section 101. But when the court (on the motion for contempt) refused petitioners any form of the relief granted by the broad terms of Section 102, it created a roadblock to the very victory it had earlier awarded them. The district court's scruple about its power "to order membership" was only of academic interest to petitioners, who simply sought an order enforcing their transfer rights for the enjoyment of the membership already found to be theirs. But when, on the contempt motion, the court confessed itself utterly paralyzed by its own scruple, this case became truly, in the Court of Appeals' phrase, "lamentable." Now that the same scruple has paralyzed the Court of Appeals, only here can relief be found.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

BRACKEN & WALSH,
Counsel for Petitioners.
By: JOHN J. BRACKEN,
A partner.

Dated:

APPENDIX A

Opinion of the Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15393

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON and COLUMBUS P. BRITTAIN,

Appellants,

v.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 14, 1965

Before McLAUGHLIN, HASTIE and SMITH, *Circuit Judges*

PER CURIAM.

The problem before us in this appeal commenced when the four plaintiffs, then and now members of the International Association of Bridge, Structural and Ornamental

Appendix A

Iron Workers, AFL-CIO endeavored to transfer from their original local to the appellee which is the local for the area where plaintiffs now reside and work. Though this was in accord with the International constitution, the transfers were deliberately blocked by appellee. Plaintiffs sued Local 483 under the Labor Management Act asking for relief both under the latter and under the International constitution. The right to transfer was the true issue and plaintiffs prevailed in the district court. The Local appealed to this court. The district court was affirmed in a per curiam opinion which, in affirming the judgment, said: "* * * for the reasons so well stated by Judge Meaney in his opinion of May 7, 1964." 342 F. 2d 430 (1965). The district court in that opinion had noted that according to Tomko v. Hilbert, 288 F. 2d 625, 630 (3 Cir. 1961), the decision in Hughes v. Local 11, etc., 287 F. 2d 810 (3 Cir. 1961) "* * * held that an action did lie under the LMRDA against a *union* for its refusal to accept a transfer of membership from another local of the same international." The district court opinion then commented "The intentions of the defendant represent an attempt to avoid, in the present action, the rules of law set forth in the Hughes case and others to be cited." In that original district court action, the union defense had been that plaintiffs had not tendered their membership books to Local 483 as allegedly called for by the International constitution. The trial court held that the plaintiffs had complied with the provision. The court, however, concluded as to specifically granting membership to plaintiffs that "* * * an order so framed may be improper under the Hughes opinion." The court therefore in its order merely allowed plaintiffs the rights named with particularity in the Labor Management Act, Section 101(a)(i) i.e. "* * * the right to nominate candidates, to

vote in elections or referendums of defendant, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations as prescribed in the constitution and by-laws applicable to the defendant herein; * * *." After affirmance of the judgment plaintiffs tendered their books to the Local in order to obtain membership therein. Their offer was refused. It was then that appellants instituted the present proceeding asking the district court to hold the Local in contempt for defiance of the court's order. The judge took the position that under Hughes it would be improper to deny appellants the privileges attached to membership above detailed but that the formal transfer to membership could not be ordered. The judge said with reference to this: "It is an anomalous situation but nevertheless that seems to be the legal position that the courts have taken." And referring to the above quoted per curiam opinion of this court affirming his opinion in the suit on the merits in this litigation, he stated: "And since the Circuit Court saw fit to go no further than that this motion must be denied." Attempt was made to obtain a rehearing out of time on the original appeal but that was denied by this court.

All of the above forced plaintiffs to go forward with the instant appeal in the hope that this court would recognize the tragic position in which they have been placed by our said per curiam. The Hughes dicta above referred to had been discussed in plaintiffs' first appellate brief and by this court at that initial oral argument but in the light of the above mentioned per curiam the trial judge in this proceeding refused to permit the stated thoughts of this court during the oral argument of the first appeal to be presented to him.

Appendix A

The appellee indicated at oral argument of this appeal that it would not voluntarily budge from its position despite the admittedly remedial purpose of the Landrum-Griffin Act. Though the sought for union membership is effectively spelled out in Section 101, because formal membership in the desired local is not specifically there stated, these appellants are condemned to the unbearable status of being legally deprived of their named International constitutional right to be accepted as members by appellee. Because of the present status of the key problem involved, it is impossible to consider it on its merits in this action. We therefore suggest if plaintiffs should see fit to do so that they file in the district court a petition for clarification of the construction of Section 101(a)(i) of the Act in this circuit as it pertains to plaintiffs' predicament. Said petition inter alia to contain a full outline of what has happened to date in plaintiffs' efforts to obtain said transfers. The objective of course would be to eventually have this court directly pass upon the merits of the precise question and so resolve the present confused, uncertain situation regarding it. At this time we express no opinion whatsoever on the merits of the controversy.

The order of the district court of March 30, 1965 will be affirmed without costs to either party as against the other.

HASTIE, *Circuit Judge*, concurring.

I agree that the district court's order be affirmed and also agree that the plight of the appellants is lamentable. However, to me the jurisdictional basis of such a new petition as the per curiam opinion of this court suggests seems

so doubtful that I do not join in encouraging that procedure.

Judge Smith concurs in Judge Hastie's concurring opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,393

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON and COLUMBUS P. BRITTAIN,

Appellants,

vs.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO
(D. C. Civil No. 316-62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court,

Appendix B

filed March 30, 1965, be, and the same is hereby affirmed, without costs to either party as against the other.

ATTEST:

IDA O. CRESKOFF
Clerk

January 21, 1966

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HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON, and COLUMBUS P. BRITTAIN,

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vs.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, etc.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND MEMORANDUM ON BEHALF OF RESPONDENT

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29 U.S.C.A. (Labor Management Reporting and Disclosure Act):

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Counter-Statement of the Questions Involved

1. Is the issue here presented a subject of conflict between the several Circuit Courts of Appeal?

2. Did the Congress intend to provide relief of a broader nature than the relief granted herein?

3. Does the doctrine of the "law of the case" apply to this proceeding?

4. Will the Court, on review of a denial of a motion to hold in contempt, undertake to amend or modify the form of the original judgment from which the petitioners did not appeal?

Statement of the Case

This is on a petition for certiorari to review, not the entry of a judgment or its affirmance or reversal, but the affirmance of an order refusing to hold defendant in contempt.

This action was brought to enforce plaintiffs' alleged rights under 29 U.S.C.A. Sec. 411 (a) (1) (Section 101 (a) (1) of the Labor Management Reporting and Disclosure Act).

Since a plaintiff's rights under this section of the Act are dependent upon his membership in the defendant union, the pre-trial order (Appendix, p. 11a, l. 4) stated that "plaintiffs allege denial of their rights under section 101 thereof as members of defendant union."

Defendant's principal contention, reserved by it in the trial court and in the Court of Appeals, consisted of a denial that plaintiffs were members of the defendant local union. This contention had been overruled by the Court of Appeals for the Third Circuit, but it was pressed by the defendant nevertheless, in the hope that the rule of law originally adopted by the Third Circuit in *Hughes* v. *Local 11,* 287 F. 2nd. 810 (1961) would be reconsidered and modified. It was the defendant's contention that membership in the local did not exist until after the plaintiffs were transferred, and that the rights secured by Section 101(a)(1) did not accrue until such membership was in existence. It was defendant's further contention that the plaintiffs already had an adequate remedy in the State courts—an action in equity to enforce their rights under the International Constitution. It has never been denied that the action in the State Court would have been adequate or available.

As is stated in the Petition for Writ of Certiorari, following the judgment in the trial court, but prior to argument

before the Court of Appeals, the International Constitution was amended so as to obviate this type of problem in the future. Thus, except for the four plaintiffs alone, the problem presented in this case was purely academic.

When, therefore, the Court Appeals declined to reconsider or modify the rule of law established in *Hughes,* but affirmed the judgment in the form fixed by the trial court, the defendant local decided not to seek further review in this Honorable Court, since the form of the judgment was such as did not seriously embarrass or prejudice it.

Thus, the original decision of the Court of Appeals, affirming the judgment below, remained without an attempt to seek a review thereof.

At this point, we must refer to the following significant facts:

1. Plaintiffs have not at any time been financially or economically prejudiced. The record in the trial court shows that they worked regularly, were not interfered with in respect to their employment, they enjoyed the benefits of the joint welfare fund during sickness of themselves or their dependents. They are merely required to pay their dues to their original local union rather than to the defendant.

2. Plaintiffs sought an order from the trial court which would require defendant to accept their transfers. Defendant objected to that order, and sought a judgment limited specifically to the rights named by Section 101 (a)(1).

The trial court *denied plaintiff's motion* for the broad relief, and, on defendant's motion, entered judgment *limited to the rights specified in Section 101 (a)(1).*

All of this appears in the Appendix submitted to the Third Circuit, on pp. 275a, 276a, and 277a.

3. Furthermore, the Trial Court, in its opinion, on pp. 274a-275a, specifically limited the relief in the manner indicated by the judgment. It said, *inter alia,*

> "The plaintiffs' request that the court enter judgment obligating the defendant Local 483 to grant them membership in defendant Local. *The Hughes case, however, indicates that an order so framed may be improper.* The court there points out that the right to transfer is not specifically enumerated in Section 101 (a)(1) of the LMRDA. (29 U.S.C.A. Sec. 411 (a)(1). This section does guarantee to them the right 'to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings * * *.' *They are entitled to all rights guaranteed to members by the LMRDA but are not entitled, under this statute, to any additional rights of members not guaranteed by this statute.*" (Emphasis supplied.)

4. In spite of the contrary language of the trial court's opinion, and in spite of its denial of plaintiffs' motion for entry of their form of judgment, *plaintiffs made no effort to appeal or seek review of the form of judgment.*

5. After the affirmance of this judgment, and the decision of defendant to seek no further review of the substantive issue involved, plaintiffs *sought to hold defendant in contempt for refusing to do what the trial court refused to order*—to accept a transfer or admit defendants into membership. It is the refusal of the trial court to hold defendants in contempt from which this appeal was taken, and which is here sought to be reviewed.

6. Petitioners make much (their brief, p. 5, second paragraph) of the statement of defendant's counsel on the application for a stay that "If the judgment is enforced giving plaintiffs membership in defendant union the basis for the appeal would be moot . . . ."

In doing so, petitioners are, we believe, unintentionally *misleading* the Court, by considering the matter out of context. The application for a stay was made in the face of an application for a contempt order, arising out of a refusal by defendant at that time to accept a transfer and admit petitioners to membership.

If the petitioners had succeeded in their motion at that time, defendants would have been compelled to admit petitioners to membership. Counsel's statement in that context was eminently correct, yet not an admission that the judgment itself contained such a provision.

7. On p. 6 of their brief, petitioners, in the last paragraph, say that the defendant has denied to them "the right to run for office." This is a flagrantly false statement, and one which has never appeared in the record anywhere, by affidavit, testimony, or even by an oral or written statement of counsel.

Thus, petitioners here seek, on an application to review a refusal to hold in contempt, to review and modify the judgment of the trial court which has been before the Court of Appeals, to which they never objected, from which they never appealed, and which they knew at the time of the entry was a denial of their application for broader relief.

The oddity of the present situation is that the petitioners have secured a judgment granting them certain rights of membership, *on the basis of the Hughes ruling that they are already members,* but now contend that the defendant

should take action to accept their transfers so as to make them members.

This anomalous situation derives from what we conceive to have been an erroneous opinion in *Hughes*, which we sought to review on the original appeal. That stage, however, has passed; the issue is academic and moot, in the light of the amendment to the International Constitution; the defendant union therefore abandoned its efforts to seek further review of that decision.

Since the form of the judgment was not appealed by the petitioners, it became final upon affirmance by the Court of Appeals and the exhaustion of the time within which to seek a writ of certiorari.

Defendant is fully complying with the terms of the judgment. Petitioners are, in effect, seeking to modify the judgment without ever having objected to it or appealed from it.

ARGUMENT

This argument is designed to respond to the arguments advanced by petitioners as grounds for the granting of the writ, and each point will directly respond to the corresponding point made by the petitioners.

POINT I

The opinion of the Court of Appeals for the Third Circuit is not in conflict with the opinion of any other circuit.

In fact, this decision is the first and only case in point. No other decision has been found by us (other than *Hughes*,

supra) dealing with the rights of a plaintiff under Section 101(a)(1) of the Act.

Petitioners, in their petition, cite three cases, but none of them is in disagreement with the Court of Appeals in the instant case. All of them deal with persons who had been full union members in good standing, who were suspended or expelled in violation of Section 101(a)(5). There was no violation of Section 101(a)(1) alleged.

In *Vars* v. *International Brotherhood of Boilermakers*, 320 F. 2nd 576 (1963) the plaintiff had been illegally expelled. The only possible relief was to set aside the expulsion. This reinstated his membership.

In *Simmons* v. *Local 713*, 350 F. 2nd 1012 (1965), the plaintiff had been illegally suspended. This also was set aside, and damages were granted, on the basis that Section 101(a)(5) had been violated.

Again, *Boilermakers* v. *Rafferty*, 348 F. 2nd 307 (1965) was a case of a violation of section 101(a)(5), not 101(a)(1). A member had been expelled for "libeling" a union officer. The expulsion was set aside, as well as damages being awarded.

Curiously enough, petitioners' brief before the Court of Appeals itself shows that the Third Circuit is not at all in conflict with the three Circuits mentioned, namely, the 2nd, 4th, and 9th. That brief cited the case of *Calabrese* v. *United Ass'n*, 211 F. Supp. 609, aff'd, *per curiam*, 324 F. 2nd 955 (3rd Cir. 1964).

In *Calabrese*, again the plaintiff was expelled from membership in violation of Section 101(a)(5). The setting aside of the expulsion, in exactly the same manner as in *Vars*, *Simmons* and *Rafferty*, was affirmed by the Third Circuit. Obviously, the Third Circuit comprehended the distinction between Section 101(a)(5) and 101(a)(1), and did not

deem its decision in the instant case to be contrary or in conflict with its earlier decision in *Calabrese* or with the three other cases cited by petitioners.

Since petitioners cited *Calabrese* to the court below, it is difficult to imagine why it was not cited in petitioners' present petition, other than to avoid establishing that the Third Circuit is *not* in conflict with the other Circuits.

We submit that it is conclusively established that there is no conflict between the various Circuits.

POINT II

It was not the legislative intent to provide broader relief than here granted.

Under this point, petitioners argue that the constitution of the International Union did not contemplate the present judicial status. However, they overlook that the Court is enforcing, not the constitution, but the statute, which supersedes the constitution.

Had petitioners wished to enforce the constitution, they could have done so by an action in equity in the state courts. They chose whatever rights the statute provided.

The best possible answer to petitioners' argument, however, is found in the *Hughes* decision, *supra,* where the court, considering the relief available, said,

> "One other issue is presented immediately for our consideration, viz., the extent of the relief to which Hughes, is entitled if the allegations of his complaint are borne out. Hughes has asked that he be granted full membership in Local 11. The defendant points out, however, that the right to transfer is not spe-

> cifically enumerated in Section 101(a)(1) and that Section 101(a)(1) only enumerates some of the rights and privileges to which a member of a labor organization is normally entitled. On its face, Section 101(a)(1) purports to enumerate all of the equal rights and privileges which it secures to members of labor organizations. These rights and privileges are 'to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings . . .' Since Hughes is a 'member' of Local 11 within the meaning of the Act, he is entitled to the rights specified. He is also entitled to all other rights accorded to a union member under the Act. But there is no warrant in the statute for granting a member of a labor organization any other membership rights secured to him by the union's constitution and by-laws which are enforceable only under state law in a suit such as that at bar. If, therefore, it is determined on remand that Hughes is entitled to relief, insofar as it is predicated on the Act, *such relief must be limited to that appropriate to secure to Hughes the equal rights and privileges guaranteed by Section 101(a)(1) and other provisions of the Act.*" (Emphasis supplied.)

May we also refer to the footnote added by the Court, which discussed the legislative history, and concluded that,

> "The present language, unlike that in the earlier proposals, does not permit of a construction that would in addition secure to members of labor organizations rights in addition to those specifically set forth."

We submit that the legislative intent to limit relief available under Section 101(a)(1) is clear.

POINT III

The doctrine of the "law of the case", if applicable, should deny relief.

We do not recall relying upon the "law of the case" in oral argument. We did not rely upon it in our brief, nor did the Court of Appeals refer to it.

We therefore do not know why petitioners have made a point of it.

However, we are not here faced with the usual type of case where substantive law, once having been decided, comes before the court as a matter of substantive law in a subsequent proceeding between the same parties.

The case now before the Court does not involve substantive law. It involves merely the determination whether the defendant is in contempt of a judgment which was not attacked on appeal, although the appeal was taken on other issues.

In such a case, the substantive issues having been decided in another proceeding and not being before the court in this case, it may very well be that the "law of the case" is applicable.

Frankly, we have found no authority on this specific question, obviously because it is probably unique. We have found no other case in which a successful party, seeking to enforce a judgment, seeks in addition to modify or reform that judgment, after time for appeal has expired.

POINT IV

This proceeding should not be used to "correct" a ruling not here under appeal.

Under their fourth point, petitioners make three arguments which we beg leave here to paraphrase.

First, they argue that the doctrine of preemption under *San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959) precludes the use of state courts to enforce union constitutions.

It is clear that the doctrine of federal preemption relates to labor-management relations, not to intra-union litigation.

In fact, section 103 of the Labor-Management Reporting and Disclosure Act specifically repudiates the concept of preemption. It says,

> "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal Law or before any court or other tribunal, or the constitution and by-laws of any labor organization."

Congress, therefore, specifically declared that state courts continue to have their powers. It was, instead, intended merely to provide specific and limited additional remedies and rights, whether or not they existed under state law.

Second, they argue that the court, once having assumed jurisdiction, should "dispose of all of it."

However, jurisdiction was assumed under Section 101-(a)(1). The court did grant all of the relief and remedies therein provided. It would not have conformed to Congressional intent to go further.

Third, they argue that the judgment below was broad enough to require the defendant to admit petitioners to membership, or "to accept petitioners' request for transfer."

They try to impute to us the same view. This we have dealt with above, showing the context in which defendant's argument was made. It is utterly untrue that we have ever been of the same view.

However, they also completely overlook, in this argument, the following factors:

1. They moved for an entry of judgment requiring us to accept their transfers.

2. We opposed that motion.

3. The court denied their motion and entered a limited judgment.

4. We appealed from the court's decision, not quarreling with the form of the judgment, but with the substantive law on which it was based.

5. They responded to our appeal, but did not appeal from the form of judgment.

6. Upon affirmance, we complied wholly with the commands of the judgment, a fact recognized by the trial court and the Court of Appeals.

7. The sole issue presently before the Court is an application to punish us for contempt for failure to comply with the judgment.

This is not the proper time or proceeding in which now to test or litigate the remedies to which petitioners may have been entitled. We believe they were entitled to no more than they received, even assuming the complete cor-

rectness of the *Hughes* case. But, having accepted the judgment without appeal, petitioners should not now be heard to object to it.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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